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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-13

W. A. BOYLE, C. W. DAVIS, and JOSEPHINE ROCHE, Trustees, UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND OF 1950,

Petitioners,

v.

THOMAS LAVELLA,

Respondent.

SUPPLEMENTAL BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Pursuant to this Court's Rule 24(5), Petitioners, the Trustees of the United Mine Workers of America Welfare and Retirement Fund of 1950, file this Supplemental Brief calling this Court's attention to intervening matter not available either on July 2, 1971, when their certiorari petition was filed, or on July 29, 1971, when Respondent filed his opposition brief.

SINCE THE LAST FILING HEREIN, THE NINTH CIRCUIT HAS TAKEN ADDITIONAL ACTION IN LEE v. NESBITT, ET AL., TRUSTEES OF THE NATIONAL MARITIME TRUST

In assigning the Reasons for Granting the Writ herein, Petitioners emphasized (Pet. 11) that the impact of the District of Columbia Circuit's opinion in the instant case could put the Trust Fund in financial jeopardy and discussed and appended to their certiorari petition (Pet. 13, fn. 12) the Ninth Circuit's recent decision in *Lee v. Nesbitt, et al., Trustees of the National Maritime Trust*, No. 25973, decided June 11, 1971 (not yet reported), holding that where an employee met all qualifications for pension benefits except age, he could not be denied pension benefits because of a subsequent involuntary separation from covered employment required for qualification. The certiorari petition (Pet. 16) observed that *Lee* "goes further than *Lavella*" (the instant case) and that both conflict with decisions in the Second, Sixth and Seventh Circuits.

Since Petitioners filed their certiorari petition herein on July 2, 1971 and Respondent filed his opposition brief on July 29, 1971, Petitioners have been advised that the Ninth Circuit, on August 13, 1971, entered an order in *Lee*, which provided that:

> "Defendants-Appellants, having filed a Petition for Rehearing (etc.) and this being a proper instance for the plaintiff-appellee to answer same; said plaintiff-appellee is requested to prepare and file such answer within 20 days, with copies to defendants-appellants."[1]

Though, as Petitioners are advised, plaintiff-appellee in the Ninth Circuit's *Lee* has filed an answer, the Ninth

[1] See Appendix A for copy of the Ninth Circuit's order of August 13, 1971.

Circuit has not yet rendered a final decision on the rehearing petition; but should the Ninth Circuit reverse its holding noted above, the Ninth Circuit would then have to be added to those Circuits with whose holdings *Lavella* (the instant case) would conflict.

CONCLUSION

Having thus apprised this Court of the foregoing intervening matter not available when the instant certiorari petition was filed, Petitioners again submit that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 15, 1971.

APPENDIX

APPENDIX A

Entered August 13, 1971

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HANDEE T. LEE,
Plaintiff-Appellee,
v.
ROBERT NESBITT, JAMES J. MARTIN, JOSEPH CURRAN, and all others who are Trustees of the National Maritime Trust,
Defendants-Appellants.

No. 25973

Before: KOELSCH, CARTER and WRIGHT, Circuit Judges

ORDER

Defendants-Appellants, having filed a Petition for Rehearing (etc.) and this being a proper instance for the plaintiff-appellee to answer same; said plaintiff-appellee is requested to prepare and file such answer within 20 days, with copies to defendants-appellants.